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Supreme Court of the United States

LYKES BROS. STEAMSHIP CO. INC.,

Petitioner,

—v.—

FRANK CANNELLA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATHAN BAKER
Counsel for Respondent

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Statement of the Case

This action arises out of accidental injuries sustained by the respondent, a longshoreman on February 19, 1945 while performing work on board the "SS NEMAHA" which was docked at a Pier in Bayonne, N. J. At about 8:00 p.m. in the evening at the close of his work as a longshoreman, the respondent was ascending a Jacob's ladder leading from the side of the vessel to the deck of a lighter upon which he had been working and when he came near the top of the ladder a wooden rung broke causing him to sustain severe injuries. The Jacob's ladder was part of the ship's gear and belonged to the vessel. The vessel was owned by the petitioner, Lykes Bros. Steamship Co. Inc., and was bareboat chartered to the United States of America. The

respondent brought suit against the owners, Lykes Bros. Steamship Co. Inc., alleging two causes of action, one based upon unseaworthiness and the second based upon common law negligence. The first cause of action was dismissed at the end of the respondent's case and the second cause of action was submitted to the jury, which returned a verdict in favor of the respondent in the sum of $12,000.

This verdict was set aside by the trial Judge and the action was dismissed.

An appeal was taken to the Circuit Court of Appeals which reversed the judgment and remanded the cause for further proceedings.

The Circuit Court of Appeals in reversing the judgment held that the respondent was entitled to a new trial on the issue of unseaworthiness at the time that the vessel was delivered by the owner to the charterer (opinion p. 182). Thereupon, the petitioner filed a petition for rehearing, wherein it set forth the provisions of the charter party, the first paragraph of Clause 1 reading as follows (p. 192):

> "Unless otherwise stated in Part I, the vessel on her delivery shall be in Class A-1 American Bureau of Shipping or equivalent, tight, staunch and strong and in every respect *seaworthy,* serviceable and fitted for normal commercial service for a Vessel of her size, type and description."

The court denied the petition for rehearing on the material grounds involved in this matter, but modified its opinion (p. 202).

Subsequently, no further action was taken by the respondent towards applying for a retrial of this case in the District Court before a Jury. Instead the respondent, apparently taking the suggestion made by the Circuit Court of Appeals in its opinion, proceeded with the trial of the admiral-

ty action which this respondent had pending against the United States of America on the admiralty side of the court. The trial of this case against the United States of America as the bareboat charterer was tried in admiralty before Judge Goddard without a jury on June 27th and 28th, 1949 and resulted in a finding by the Court that the respondent, United States of America, was responsible for unseaworthiness of the vessel resulting in the injuries sustained by this respondent and awarded a decree in the sum of $12,000. A copy of the Court's opinion and the decree is annexed hereto.

The said admiralty case involved the same accident as involved this matter. The same plaintiff was involved and the same attorneys represented both of the parties. From said decree in the admiralty case an appeal was taken to the Circuit Court of Appeals for the Second Circuit on August 15, 1949, which appeal is still pending.

ARGUMENT

Summary of the Argument

POINT A. **The decision of the Circuit Court of Appeals follows decisions of the Supreme Court holding the shipowner liable for unseaworthiness at the time of the demise charter, resulting in an injury to a longshoreman, which liability is based on maritime law and not upon any warranty, express or implied.**

POINT B. **The legal question presented by the petitioner is moot as the petitioner has defended and is now appealing a proceeding in admiralty against the bareboat charterer The United States of America by the respondent herein, wherein the admiralty judge has found the charterer chargeable with unseaworthiness and awarded a judgment to the respondent herein.**

POINT A

The decision of the Circuit Court of Appeals follows decisions of the Supreme Court holding the shipowner liable for unseaworthiness at the time of the demise charter resulting in an injury to a longshoreman, which liability is based on maritime law and not upon any warranty, express or implied.

This case presents no new question of maritime law affecting demise chartering operations. The decision of the Circuit Court of Appeals follows decisions of the U. S. Supreme Court holding the owner of the vessel liable for unseaworthiness at the time of the demise, to the bareboat charterer and to the bailee of cargo and merely extends the liability to an injured longshoreman.

The U. S. Supreme Court decided the legal question involved in the case of *Cullen Fuel Co.* v. *W. E. Hedger*, 290 U. S. 82, 54 S. Ct. 10, where the trial court found that the vessel was unseaworthy at the time of the demise and found that the bailee of the cargo was entitled to recover from the owner, and refused limitation to the owner on the ground that the charter was the personal contact of the owner and included an implied warranty of seaworthiness. The court in its opinion stated:

> "The warranty of seaworthiness is implied from the circumstances of the parties and the subject matter of the contract and may be negatived only by express covenant. It is as much a part of the contract as any express stipulation. Delaware & Hudson Canal Co. v. Penna. Coal Co., 8 Wall. 276, 288, 19 L. Ed. 349; Grossman v. Schenker, 206 N. Y. 466, 469, 100 N. E. 39; United States v. A. Bentley & Sons Co. (D. C.), 293 F. 229.

> The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control."

If liability of an owner of a vessel for unseaworthiness exists in favor of the bareboat charterer and in favor of a bailee of cargo, it must logically follow that this same liability should extend to a seaman in the employ of the charterer and to longshoremen performing ship's service under intermediary employers.

The Circuit Court of Appeals following the doctrine of the decision of the U. S. Supreme Court in the *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85 which decided that a shipowner was liable to a longshoreman who had been injured by the unseaworthiness of the ship, found that a proper corollary of that decision was to impose on the owner out of possession a direct personal liability for unseaworthiness at the time of the demise.

As was stated by the U. S. Supreme Court in the *Sieracki* case:

> "It is a form of absolute duty owing to all within the range of its humanitarian policy."

The personal rights of seamen and longshoremen are more within the range of that humanitarian policy than the property rights of the charterer and the cargo bailee in the *Cullen Fuel* case, *supra*.

The extension of the legal principles established in the *Cullen Fuel* case so as to include longshoremen in its bene-

fits, so that now as to longshoremen as well as to charterers and cargo bailees, the shipowner is absolutely liable for unseaworthiness of the vessel at the time of the demise charter, does not make any change or departure from the existing maritime law.

The decision of the Circuit Court of Appeals in refusing to consider the demise charter on the application for rehearing (p. 203) was proper and did not place any additional burden on the owner. It merely followed the decision of the U. S. Supreme Court in the *Seas Shipping Co.* v. *Sieracki* case, 328 U. S. 625 and stated:

> "In that case the Supreme Court decided that, quite independently of any warranty of seaworthiness, a shipowner was liable to a longshoreman who had been injured by the unseaworthiness of the ship. This the court held, was not a consensual, but an imposed, liability; and indeed the opinion suggested that it had been a mistake ever to suppose that in origin the liability for unseaworthiness demanded any warranty, express or implied."

This imposed liability for unseaworthiness is based on maritime law, and not upon warranty, express or implied. Therefore, consideration of the charter party agreement is immaterial and has no bearing on the legal question involved. The Circuit Court of Appeals correctly stated (p. 203):

> "By hypothesis the longshoreman is not a party to that contract, or to any contract, with the owner; and the question is of a liability imposed in invitum because of the ship's unseaworthiness."

citing *Seas Shipping* v. *Sieracki, supra.*

It is submitted that the decision of the Circuit Court of Appeals is correct and follows the law established by the U. S. Supreme Court in the *Cullen Fuel* and *Sieracki* cases above cited and is a proper corollary of these decisions.

POINT B

The legal question presented by the petitioner is moot as the petitioner has defended and is now appealing a proceeding in admiralty against the bareboat charterer, The United States of America by the respondent herein, wherein the admiralty judge has found the charterer chargeable with unseaworthiness and awarded a judgment to the respondent herein.

The legal questions raised by the petitioner is now moot. To proceed to a legal determination of the questions presented by the petitioner on this petition would avail it nothing.

The petitioner apparently attempts to avoid responsibility on its part as the owner of the vessel, contending that the responsibility for unseaworthiness is on the United States of America as the bareboat charterer. The respondent in this matter instead of proceeding with the retrial of the civil case involved herein, apparently took the suggestion of the Circuit Court of Appeals and proceeded with the admiralty action then pending against the United States of America. The Circuit Court of Appeals in its decision stated (p. 187):

> "We hold that the defendant was so liable, and upon a new trial the plaintiff may have his damages assessed by a jury, if he can satisfy them that the unseaworthy rung was on the ship, and in the same

> condition, when the defendant delivered her to the United States. However, it may be that he will not be able to make that proof; and if he cannot, another course is open to him. • • • he will avoid the necessity of proving that the rung was on board, and unseaworthy, when the defendant delivered the ship to the United States."

In the admiralty action the respondent was the libellant in its action against the United States of America as the bareboat charterer and after trial before an admiralty Judge without a jury, the court found that the vessel was unseaworthy and responsible for the injuries to the plaintiff and entered judgment in the sum of $12,000. A copy of the opinion of the Admiralty Court and a copy of the judgment are annexed hereto. The United States of America in the admiralty case was represented by the same attorneys as the petitioners in this case, and have filed an appeal to the Circuit Court of Appeals on August 15, 1949, which appeal is still pending.

It therefore appears that it would serve no beneficial purpose to consider the legal question presented whether the respondent can hold the petitioner, as shipowner, liable for unseaworthiness at the time of delivery of the vessel to the charterer when the record shows that in subsequent proceedings in admiralty, respondent has recovered a judgment against the bareboat charterer on the finding of unseaworthiness.

The question is moot and the writ of certiorari should be denied.

In the case of *Chicago Great Western Railroad Co.* v. *Beecher*, 150 F. 2nd, 2nd series, 394, cert. denied 63 S. Ct. 1158, the court held:

"Another well established rule is that courts will decide only actual controversies, and that an appellate court, when an event has occurred which renders it impossible to grant any effectual relief to the appellant, will not proceed to judgment but will dismiss the appeal."

In the case of *Otis* v. *Inter Mercantile Marine Co.*, 95 F. 2nd 539, C. C. A. 9th Circuit, the court stated:

"This appeal presents a single question namely did the District Court have jurisdiction of the case? This question is now moot. For us to answer it in the affirmative, reverse the decree of dismissal and remand the case for further proceedings would avail libelants nothing. The subject matter of the litigation no longer exists. Possession thereof cannot be obtained by court decree or otherwise. * * * Presenting only a moot question, the appeal will be dismissed. Mills v. Green, 159 U. S. 651; Jane v. Montague, 194 U. S. 147; Richardson v. McClenney, 218 U. S. 487; Stearns v. Wood, 236 U. S. 75."

In the case of *The Silver Palm*, 94 Fed. 2nd 781, the court stated:

"The petition for limitation of liability was finally denied by the District Court and its denial affirmed by this court, this court dissolving the injunction against separate proceedings and holding that all the claimants could pursue their claims in the limitation proceeding or on separate litigation, as they may be advised. Consequently, the claimants may so proceed, and the issue on this appeal respecting the modification of the injunction has become moot. The appeal is therefore dismissed."

CONCLUSION

It is therefore, respectfully submitted that there was no substantial error in the proceedings below and no sufficient grounds for a further review have been shown and that this case is not a proper one for review by certiorari in this court. The petition for writ of certiorari should be denied.

Respectfully submitted,

NATHAN BAKER
Counsel for Respondent

EXHIBIT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A 144-9

FRANK CANNELLA,

Libelant,

—against—

UNITED STATES OF AMERICA
and WAR SHIPPING ADMINISTRATION,

Respondents.

MEMORANDUM

GODDARD, *District Judge* (Orally):

The libelant, Frank Cannella, a stevedore in the employ of M. P. Smith & Sons Co. Inc., was engaged in discharging cargo from a lighter aboard the steamship Nemaha which was moored to a pier at Bayonne, New Jersey.

At 7:45 in the evening of February 19th, 1945, after Cannella and others on the lighter finished work and he was climbing up a jacob's ladder to cross the ship's deck on his way ashore, he fell to the deck of the lighter and was injured. It was a rope ladder with rungs of wood and was furnished by the ship.

The case presents an issue of fact. The libelant and his witness testified that one of the rungs broke. The

respondent's witnesses deny that it broke and assert that it was in good condition.

I did not see all the witnesses as some of the testimony was in the form of deposition or testimony given in another trial. I did see and hear Cannella and DiSimone, the hatch foreman, and each of them impressed me as honest and reliable. Cannella said the rung gave way and DiSimone testified that he examined the ladder after Cannella fell, and that one rung was "split and broke right in two". Clark, Second Officer on the Nemaha, in a deposition testified that he saw the ladder after the accident and that one of the rungs was broken.

The respondents' evidence as to the condition of the ladder consisted of the testimony of the Chief Officer, night mate and boatswain of the Nemaha in another trial; also the testimony of Cappola, a longshoreman. Each said they had looked at the ladder after the accident and that it was in good condition. There was nothing in the log of the Nemaha indicating that the ladder had been examined by any of them after the accident and that it was in good condition and no report, written or otherwise, was made by either of them as to the ladder and its condition, and their testimony was based upon their memory over three years later and was so elaborate that it lacked conviction, and Cappola did not impress me favorable. I give no credance to the statement alleged to have been made to respondents' claims agent by Cannella soon after he had been taken to the hospital suffering from severe shock and under the influence of drugs to relieve his pain.

My conclusion is that the ladder was defective and broke; that the Nemaha was unseaworthy in this respect and that this was the cause of Cannella's fall.

Cannella sustained a fracture of the right femur and a metal pin was inserted to keep the parts in place. He was

in the Bayonne Hospital for about two months and was confined to his home for seven months. He has a shortening of the right leg of 5/8 to 3/4 of an inch; walks with a slight limp, and has a loss of flexation in right hip compared with left hip of 10-15 degrees.

On January 2, 1946 he started working, doing light work for some weeks and for some months lost an average of one day a week because of the condition of his leg.

His doctors and hospital bills amounted to $740. In 1944—the year before he was injured, he earned $4,071.08.

In my judgment fair compensation for the expenses he has incurred, loss of earnings, pain and suffering, is $12,000.00.

The libel contains two counts. 1—Alleging unseaworthiness; 2—negligence.

Libelant may have a decree on the First Count for $12,000.00 and dismissing the Second Count.

June 28, 1949.

HENRY W. GODDARD
U. S. D. J.